Supreme Court of the United States

OCTOBER TERM, 1950.

No. 25

SUTPHEN ESTATES, INC.,
Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., *et al.*,
Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS AND MOTION TO AFFIRM.

BERTRAM F. SHIPMAN,
Counsel for Appellant.

MUDGE, STERN, WILLIAMS & TUCKER,
H. G. PICKERING,
MILTON BLACK,
LEONARD GARMENT,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

SUBJECT INDEX.

TABLE OF CASES CITED.

STATUTES, ETC., CITED.

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 668.

SUTPHEN ESTATES, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA, LOEW'S INCORPORATED, WARNER BROS. PICTURES, INC., *et al.*,

Appellees.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS AND MOTION TO AFFIRM.

This brief is submitted pursuant to paragraphs 3 and 4 of Rule 7 of this Court in opposition to (a) the Warner Defendants' statement in opposition to jurisdiction, which includes a prayer to dismiss, and (b) the motion of the United States to affirm.

Preliminary Statement.

This is a direct appeal from an order of the United States District Court, Southern District of New York, denying Appellant's motion to intervene in an action brought by the United States to enjoin violations of Sections 1 and

2 of the Sherman Antitrust Act by certain motion picture producers, exhibitors and distributors and from a Consent Judgment entered therein against Warner Bros. Pictures, Inc. (hereinafter referred to as Warner), Warner Bros. Pictures Distributing Corporation and Warner Bros. Circuit Management Corporation (said three defendants being hereinafter referred to as the Warner Defendants). The cause was tried by a three-judge court. Appellant's motion and the proposed Consent Decree were presented to said court on the same day (January 4, 1951) and after a hearing the court denied said motion and signed the Consent Judgment, which was entered the following day (January 5, 1951). A formal order denying Appellant's motion was made and entered February 20, 1951.

Appellant's appeal was allowed March 2, 1951 and appeal papers were served upon the United States and all defendants on March 6, 1951.

No opinion was delivered by the District Court on the denial of Appellant's motion or on the signing of the Consent Decree.

Jurisdiction.

The jurisdiction of this Court to review said Consent Judgment and said order is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (15 U. S. C., Sec. 29), and Title 28 U. S. C., Sec. 2101.

Appellant's intervention was claimed as of right under Rule 24(a), and as matter of discretion under Rule 24(b), of the Federal Rules of Civil Procedure and also under the due process clause of the Fifth Amendment to the Constitution of the United States.

The pertinent provisions of the statutes and rules are quoted in Appellant's Statement of Jurisdiction, pp. 3-5.

ARGUMENT.

A.

This Court clearly has jurisdiction of this appeal.

That this Court has jurisdiction is clear from Appellant's discussion of that subject in its Statement of Jurisdiction and from the statutes and authorities there referred to (pp. 3, 4).

The appeal is from the final Warner Consent Judgment and from the order denying Appellant's intervention which was claimed as of right under Rule 24(a) of the Federal Rules of Civil Procedure.

The subject of appealability of orders denying applications for intervention under Rule 24(a) of the Federal Rules of Civil Procedure which provides for intervention as of right and under Rule 24(b) which relates to permissive intervention was considered by this Court in *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co., et al.*, 331 U. S. 519 (1947). This Court said:

> "Our jurisdiction to consider an appeal from an order denying intervention thus depends upon the nature of the applicant's right to intervene. If the right is absolute, the order is appealable and we may judge it on its merits. But if the matter is one within the discretion of the trial court and if there is no abuse of discretion, the order is not appealable and we lack power to review it" (pp. 524-525).

The Warner Statement relies upon *St. Louis Amusement Co.* v. *United States*, 326 U. S. 680 (1945), as requiring a dismissal of this appeal. It is clear from the statement of jurisdiction and opposing papers filed on that appeal and from the cases cited in the *per curiam* decision

of this Court that the petitioner sought intervention "for the purpose of impeaching a decree already made" (*U. S. v. California Canneries,* 279 U. S. 553, 556 (1929)), and that the judgment complained of (the interim consent judgment in this cause providing for a system of arbitration) was not a final judgment (*Allen Co.* v. *Cash Register Co.,* 322 U. S. 137, 142 (1944)).

In the *Cash Register Co.* case the appeal to this Court from an order denying intervention in an antitrust action brought by the United States was dismissed on the ground that it was but an order in the cause and not the final judgment. Noting, however, that a final decree had been entered prior to the allowing of the appeal, this Court said:

> "* * * if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act, and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment * * *." (322 U. S., at p. 142)

The Warner Consent Judgment appealed from is the "final decree" in this cause and is attacked because Appellant has been wrongfully denied intervention.

This Court's affirmance of orders denying intervention in relation to the Final Decree as to all defendants in this cause (*U. S. v. Paramount Pictures, Inc., et al.,* 334 U. S. 131, 178 (1948)) and in relation to the final Consent Judgment as to the Paramount defendants (*Ball, Trustee* v. *U. S.,* 338 U. S. 802 (1949), and *Partmar Corporation* v. *U. S.,* 338 U. S. 804 (1949)) establishes that this Court has jurisdiction of Appellant's appeal. This is tacitly conceded by the Government, which has not moved to dismiss but to affirm.

B.

Appellant was entitled as of right to intervene and the denial of such right was error.

Before answering the contentions of Appellees it will be helpful briefly to summarize Appellant's position.

The Warner Consent Judgment requires a distribution of all of the property of Warner. The court below exercised jurisdiction with respect to the property, assumed control over it and decreed its disposition. The distribution or disposition of all of the property of Warner so decreed adversely affects Appellant with respect to Warner's guaranty of the obligations of its subsidiary under a theatre lease (not disturbed by the Consent Judgment) with Appellant which has more than 75 years to run, with a cash liability of more than $23,000,000. The Warner guaranty of the lessee's obligations under the lease is a valid subsisting obligation unrelated to any antitrust violations by Warner or any other defendant in this cause.

This would seem to be a situation squarely within clause 2, Rule 24(a) of the Federal Rules of Civil Procedure, which requires the allowance of intervention "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." Appellant based its right to intervene also upon the ground that representation of its interest by existing parties was inadequate and Appellant was or might be bound by the Consent Judgment (clause 2 of Rule 24(a)), and upon the due process clause of the Fifth Amendment to the Constitution of the United States.

The judgment effects the destruction of the Warner guaranty. The judgment in substance requires Warner to transfer all its theatre assets to a new Theatre Company and all its other assets to a new Picture Company in exchange for all of the stock of the two new companies, which is to be issued directly pro rata to the Warner stockholders. Warner, thus rendered insolvent, is then required to be dissolved.

The Final Decree of February 8, 1950 of the District Court in this cause, affirmed by this Court (*Loew's Incorporated, et al.* v. *United States*, 339 U. S. 974 (1950)) did not require the reorganization and dissolution of Warner as provided for in the Consent Judgment. What was required by that decree was "the ultimate separation of its distribution and production business from its exhibition business". (Exhibit 1 to Appellant's Statement of Jurisdiction, Section IV, pp. 19-20). The particular plan selected from among many which might have been chosen was presumably considered most advantageous to the stockholders of Warner as a tax-free reorganization but it directly, seriously and unnecessarily affects the rights of Appellant under the Warner guaranty.

The remedy sought by Appellant was simply that the court ascertain what should be substituted for the guaranty whose destruction it was bringing about. Appellant prayed that this be done either by a provision in the Consent Judgment or by a separate order in the cause. (Appellant's Statement of Jurisdiction, Pleading in Intervention, Exhibit 4 (c), p. 68). At the hearing below it was made clear that Appellant was not seeking to disturb or delay the making of the Consent Judgment. Appellant offered to postpone the intervention hearing three or four weeks to see if a satisfactory solution could be worked out with Warner. (See p. 10, 12 *infra*.)

Appellant did not and does not challenge the Consent Judgment or any of its provisions in any respect. It did not and does not seek in any manner to interfere with or obstruct the distribution of the property of Warner or its dissolution as required by the Consent Judgment. It had and has no desire or intention to interject itself in the litigation between the United States and Warner in respect of the enforcement of the antitrust laws and the formulation of remedies for their violation. It did not and does not question the propriety of, or seek in any manner to have modified, the remedies imposed by the Consent Judgment.

Appellant's contention was and is that it is entitled to have the court below in this cause ascertain and order an equivalent substitute for the guaranty of Warner. The substitute prayed for in Appellant's Pleading in Intervention is the guaranty of both new companies to which the Consent Judgment requires all of the property of Warner to be transferred. (Exhibit 4(c) to Appellant's Statement of Jurisdiction, paragraphs (b) and (c), p. 68).

The following considerations plainly entitle Appellant to such relief:

1. Upon a voluntary corporate reorganization where a new company is organized and receives all the assets and continues the business of the old corporation and all of the stock of the new company is distributed pro rata to the stockholders of the old company which is then dissolved, the new company is deemed to have assumed all the obligations of the old corporation. This is but an application of the corporate trust fund doctrine which safeguards those who deal with corporations against distribution of corporate assets to stockholders in priority over corporate creditors. In such case not only can the corporate assets

be followed, but, there being identity of stockholders in the transferee and transferor corporations, the transferee corporation becomes personally liable. *Calvin* v. *Washington Properties*, 121 F. (2d) 19, 25 (C. A. D. C., 1941); *Pearce* v. *Schneider*, 242 Mich. 28, 217 N. W. 761 (1928); *Bankers Trust Co.* v. *Hale & Kilburn Corporation*, 84 F. (2d) 401 (C. A. 2nd, 1936); *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482, 502-503 (1913); *Male* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 230 N. Y. 158, 165 (1920).

2. The same rule applies where there are two transferee corporations whose stockholders and those of the transferor corporation are identical. *Bankers Trust Co.* v. *Hale & Kilburn Corp.*, 84 F. (2d) 401 (C. A. 2nd, 1936). Accordingly both transferee corporations would be personally liable for all obligations of the transferor corporation.

3. Appellant therefore sought to have the court adjudicate only the obligation which under established principles of equity would be imposed upon the new Picture Company and the new Theatre Company as matter of law if the Warner reorganization were free of the compulsion of a Consent Judgment in an antitrust action.

4. The fact that the distribution of Warner's property and its dissolution are required by the Consent Judgment and may be held not to be voluntary[1] casts doubt as to the applicability of these settled equity principles. Moreover, the categorical statement of the United States on the hearing below (as quoted in Warner's Statement filed herein) that it would be unalterably opposed to a guaranty by the

[1] In *Kokel* v. *Paramount Pictures, Inc.*, 300 N. Y. 685 (1950), it was held that the dissolution of Paramount pursuant to the plan of reorganization under the Paramount Consent Decree in this cause was not voluntary.

new Picture Company is advance notice of its opposition to any attempt hereafter to impose such guaranty obligation on the two new companies under the settled equity doctrine.

5. Appellant has no adequate remedy except by intervention in this action. Since Warner's guaranty is a contingent obligation, Appellant's right to enforce the liability against property in the hands of the transferee corporations or against the shares of stock of those corporations in the hands of Warner's 27,000[2] stockholders will not arise until there is a default under the lease and judgment is obtained against Warner. As the lease has more than 75 years to run (and defaults might not occur for 10, 20 or 50 years or more) such right will prove to be illusory and unenforceable for all practical purposes because of changes which will inevitably occur in the assets themselves, in their ownership and in the ownership of shares of stock of the two new companies. Any remedy available to Appellant on the dissolution of Warner is highly conjectural. At the time of its dissolution Warner will have transferred all its property to the two new companies whose stock will have been distributed to the Warner stockholders. There is no basis for assuming that any court would at that time have jurisdiction over the necessary parties, including the two transferee corporations, so as to be able to decree an appropriate substitute for the Warner guaranty. On the other hand, the court below has indisputable jurisdiction with respect to Appellant's claim. It has jurisdiction over Warner and in the Consent Judgment has required that the two new companies consent to be bound by the provisions applicable to them and to be subject

[2] See Statement of Warner.

to the jurisdiction of the court with respect to the construction, modification, carrying out of, and enforcement of compliance with, the Consent Judgment (Section VI, C and D and Section XI, B, Exhibit 2 to Appellant's Statement of Jurisdiction, pp. 27, 54-55).

C.

Appellees' contentions in opposition to Appellant's right to intervene are without merit.

1. Appellees contend that Appellant's position with respect to an equivalent substitute for the Warner guaranty is without equity because upon dissolution of Warner it is proposed that Appellant will be given the guaranty of the new Theatre Company and there is no showing that such guaranty "would not be such an equivalent" and it "might be not only adequate but even more than equivalent because the theatre company will be freed from the fluctuations of the distribution business". (United States' Motion to Affirm.) Neither the Consent Judgment nor the plan of reorganization submitted to stockholders contains any provision to the effect that Appellant will have the guaranty of the new Theatre Company. Such a suggestion had been made informally by Warner and was referred to at the hearing. There are, however, numerous answers to the suggestion. (a) It is obvious that the guaranty of the new Theatre Company would not be the equivalent of a guaranty of Warner; half a loaf is not the equivalent of a whole loaf. (b) For many reasons it is wholly unforeseeable whether a guaranty of the new Theatre Company would be "adequate".[3] (c) The question is not one of

[3] For example, it is common knowledge that the impact of television on the motion picture theatre industry and particularly on theatre attendance is serious and immeasurable.

Again, the defendants in this cause, including the Warner defendants, are parties to a multitude of anti-trust treble damage

adequacy of the substitute but of equivalence.[4] (d) Appellant is entitled to have the equivalent substitute for the Warner guaranty determined by the court and should not be relegated to what the United States or Warner considers equivalent or adequate.

2. The United States says it would be opposed to a guaranty by the new Picture Company of the obligations of a subsidiary of the new Theatre Company because the new Picture Company would have an interest in the success of the subsidiary and that would be contrary to the purpose of the Consent Judgment which is to separate the exhibition business from the production and distribution business of Warner. While it is the contention of Appellant that any interest of the new Picture Company in the exhibition business resulting from a guaranty of the new Picture Company would be unsubstantial and inconsequential, it is obvious that the objection of the Government is an argument on the merits of the very question sought to be raised by Appellant's Pleading in Intervention and should be determined by the court which made the judgment and is best able to determine its underlying policy.

3. It is urged by Appellees that Appellant is not bound by the Consent Judgment. This contention is completely unrealistic. Manifestly, Appellant is hit by the Consent Judgment, its rights and interests in the guaranty of

---

suits. Mr. Kenneth C. Royall, former Secretary of War and now of counsel for Twentieth Century-Fox Film Corporation, testified before the House Judiciary Anti-Monopoly Sub-Committee on April 13, 1951, that damage suits involving a total of 200 million dollars are now pending against the motion picture industry and placed the value of the industry at between 400 and 500 million dollars.

[4] See *Continental Insurance Company* v. *United States, Reading Company, et al.*, 259 U. S. 156, 172-173, (1922), referred to in Appellant's Statement of Jurisdiction. P12

Warner are to be destroyed by it and there is no way that Appellant can challenge or avoid the Consent Judgment or the distribution of the property of Warner or the dissolution of Warner.

4. Appellees' contention that the claim of Appellant was asserted prematurely has been answered by showing that Appellant has no other adequate remedy (pp. 6-7, 9-10, *supra*). Reference is made by Appellees to a statement of counsel for Appellant on the hearing below that "it may be that we are here prematurely". The context makes it clear that all that was meant by counsel was that it might be premature to hear the application until the Warner plan of reorganization was formulated. Counsel said:

> "Now, what is going to happen from here on, I assume, is that the Warner people are going to be preparing a proxy statement. That proxy statement will have to set forth in considerable detail what they propose to do with the assets, how they propose to take care of the liabilities of these companies. They will be confronted with this problem, will have to meet it and will have to solve it. We may be of assistance in solving it.
>
> "So that my practical suggestion is that this matter be deferred for three or four weeks, adjourned, to see if we can arrive at a solution."

The postponement was opposed by the United States and Warner and was denied and when the Court announced its decison denying intervention Appellant's request that the denial be without prejudice was also denied. The Warner proxy statement subsequently mailed to stockholders, which is on file with the Securities and Exchange Commission[5] and in which the plan of reorganization is set forth,

[5] See Warner Statement.

did not provide any solution of the problem. It contains a general statement that the new Theatre Company will assume liabilities and obligations of Warner relating to assets transferred to it, and the following:

> "Holders of contracts with and guarantees by Warner may claim that both of the New Companies are liable on such obligations, and one such claim has been made. The validity and the amount of claims which may be made against the New Company which does not assume such obligations is indeterminable."

The Consent Judgment contains, in Section XI, B, a provision retaining jurisdiction of the cause "for the purpose of enabling any of the parties and their successors to this Consent Judgment, and no others" to apply to the court for further orders or direction, etc. (Statement of Jurisdiction, pp. 54-55). Appellant was therefore by the terms of the Consent Judgment precluded, after its entry, from making any application for relief.

Accordingly Appellant in seeking to intervene was not premature.

5. The Government and Warner have referred to a remark by the court below at the hearing that "there must have been a great many situations like this in this case". Counsel for Appellant replying to this suggestion, said "While I appreciate that this client (sic) [plan] takes the familiar form of plans that have been already approved, I think there was no comparable situation to this in either the Paramount case or the RKO case." At this point the court interrupted, saying "We shall have to deny this application." Had counsel completed his statement he would have said that he had previously canvassed the subject with counsel for Paramount and counsel for RKO and had been